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No. 1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Thomas Earl Simmons and Robert James Garrett, pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above entitled cause, dated December 7, 1966, affirmed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered December 7, 1966 and is reprinted as Appendix B, *infra*. A Petition for Rehearing was timely filed but was denied by order dated January 23, 1967, which order is reprinted as Appendix C, *infra*.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, entered on December 7, 1966, affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division. On December 20, 1966, the Court of Appeals extended the time for the filing of Petitioners' Petition for Rehearing to and including January 16, 1967. Said Petition for Rehearing was filed on January 13, 1967. On January 23, 1967, the Court of Appeals denied Petitioners' Petition for Rehearing. This Petition for a Writ of Certiorari is filed within thirty days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where investigative techniques of Federal agents focus the attention of identification witnesses on one particular suspect, have the standards of fairness required by due process been met?

2. Did the trial court err in refusing a defense request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from government witnesses subsequently incorporated by reference into the witnesses' statements, where identity was the vital issue of the trial?

3. Should a defendant who testifies to enforce his constitutional rights guaranteed by the Fourth Amendment be required to sacrifice his rights under the Fifth Amendment?

AMENDMENT IV TO UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Nature of the Case and its Disposition:

This case was commenced by an indictment which was returned against the Petitioners and another defendant, William Andrews. The indictment charged the Petitioners and Andrews with taking a sum of money from a federally insured savings and loan association in violation of Section 2113, Title 18 of the United States Code (Count I); (b) with putting the lives of employees of the same savings and loan association in jeopardy by the use of danerous weapons in violation of Section 2113, Title 18 of the United States Code (Count II). (A. 1). The Petitioners' trial resulted in the jury's verdict of guilty as charged in both Counts of the indictment. Upon the return of the verdict of guilty, Petitioners were sentenced to the custody of the Attorney General for imprisonment for a period of ten years. Notice of Appeal on behalf of the Petitioner Robert James Garrett was timely filed. Notice of Appeal on behalf of the Petitioner, Thomas Earl Simmons was timely filed.

On December 7, 1966, the Court of Appeals entered a decision which affirmed the judgment of the Petitioners' convictions but reversed without remand the conviction of the Defendant, William Andrews. (Appendix A, *infra.*) Petitioners timely filed a Petition for Rehearing which was denied by order dated January 23, 1967 (Appendix C, *infra*). Thereafter, this Petition for Certiorari was timely filed.

B. The Evidence:

On February 27, 1964, two men, later identified as Simmons and Garrett, entered the Ben Franklin Savings and Loan Association, 4812 South Pulaski Road, Chicago, and asked for a money order. (A. 6). One of the men then thrust a gun through one of the teller windows, handing the teller a blue bag and demanding that she "sack it or stack it." (A. 29). The teller filled the bag with some $1,500, and the two men fled. (A. 29, 34). An employee of the savings and loan followed the men outside into the street and saw them drive away in a white 1960 Thunderbird.

A similar Thunderbird was identified soon after the robbery as belonging to Mary Ruth Rey, a sister of defendant, Andrews. (A. 15). Andrews had borrowed the car from his sister on the day of the robbery at about 11:30 a.m. to drive to Indiana. He returned it at 2:30 p.m., according to Helen Scapardine who was using the car while Mrs. Rey was in the hospital. (T. 27-32).

The next day the F.B.I. obtained from Patricia Schuster, another sister of Andrews, several snapshots of Simmons. Patricia Schuster is also Simmons' sister-in-law. (A. 41-42). These pictures were then shown to each of the savings and loan employees who later at the trial identified Simmons as one of the robbers. (A. 8, 18, 26-27, 31, 34-35). Three of the witnesses also viewed the snapshots immediately before they testified. (T. 252, A. 31, T. 360). There was never a line-up or any other kind of personal confrontation and identification of any of the defendants prior to the trial of the case.

At approximately three o'clock in the afternoon of February 1, 1965, six men with drawn guns forced their way into the home of Mrs. Mahon, the mother of the defend-

ant, Andrews. After ransacking the house without permission, they suddenly left, taking nothing. (T. 209). Then, at about 6:30 p.m., agents Huntington and Quinlan of the F.B.I. arrived at Mrs. Mahon's house, without a warrant (T. 224), and went directly to the basement where they found two suitcases in which money wrappers and other incriminating evidence were found. Mrs. Mahon stated that she gave no permission, and asked them not to take anything (T. 213-14). Agent Huntington said that they had consent, and that they were escorted to the basement where the suitcases were found (T. 230-31). They had "no idea" there was a suitcase there at the time (T. 232). At trial, the Petitioner Garrett moved to suppress the suitcases as evidence, and took the stand in his own behalf to testify that one of the suitcases was his (T. 183-205). The suitcase had been left at the home of Mrs. Mahon on the morning of February 27, 1964, and Garrett at no time consented to its removal from the premises of his friend's mother (T. 203-04).

During the trial, Mr. Betts, the Court Reporter, was called by the Government and read to the jury the transcript he had made of the testimony of the Petitioner Garrett during the hearing on suppression of the evidence seized without a warrant. (T. 386-400). This was done over the objection of counsel for the Petitioner Garrett. (T. 374-85).

Petitioner Simmons swore that he was not in the savings and loan on February 27, 1964. He said that he arrived in Chicago that day along with Garrett and Andrews and went to the home of Pat Schuster, his sister-in-law. After visiting with Pat Schuster for about an hour, Simmons went with the other two men to a tavern for a beer. Andrews left the two others to pick up the borrowed car. When

the three left the tavern, Simmons went alone to a drive-in for a sandwich. He then went to another tavern for about an hour and then walked back to Pat Schuster's house to pick up his suitcase, arriving there about 2:30 p.m. Simmons further testified that Andrews and Garrett, who had planned to use the borrowed car for a trip to Indiana, arrived back at Pat Jones' house fifteen minutes later. Joe Franz, proprietor of a newspaper circulation office located nearby, then came and told Simmons that the police were looking for him. Franz, who was questioned by the F.B.I. for six hours but never charged with anything (A. 16), arranged transportation for Simmons to Indiana. Simmons boarded a bus in Indiana for Tennessee (A. 44-46).

REASONS FOR GRANTING THE WRIT

WHERE THE INVESTIGATIVE TECHNIQUES OF FEDERAL AGENTS FOCUSED THE ATTENTION OF IDENTIFICATION WITNESSES ON ONE PARTICULAR SUSPECT, THE STANDARDS OF FAIRNESS REQUIRED BY DUE PROCESS WERE NOT MET

The most important safeguard against the conviction of an innocent citizen is an unbiased, impartial police investigation. This is particularly true where it is not the suspect's intent but his identity that the investigation seeks to reveal. An undue focusing of attention on one particular suspect in the early stages of investigation can indelibly imprint on a witness's mind an incorrect picture of the perpetrator of an offense.

The police agency in this case, the Federal Bureau of Investigation, must be forcefully told that their zeal to secure an identification cannot be allowed to destroy the possibility of an objective impartial judgment by an accusing witness. The police technique must meet with the requirements of decency and fairness established as the fundamental law of the land.

The primary issue presented at the trial of the case was identity. Two men robbed the Franklin Savings and Loan on February 27, 1964. Mr. Mazaika, an employee of the savings and loan, saw the two men leave after the robbery in a 1960 Thunderbird. Mr. Mazaika said that the car had a big scrape along the door on the passenger side. (A. 7). The police immediately searched the area to locate the described automobile (A. 15).

At about 2:30 p.m., this search led to a Thunderbird owned by Mary Ruth Rey, sister of defendant, William Andrews. (A. 15). At about 3:00 p.m., the home of Andrews' mother was searched. (A. 22). The next day the F.B.I. obtained snapshots of Andrews and Simmons from Pat Jones, another sister of Andrews. (A. 42). Each savings and loan employee viewed these snapshots on the 28th or shortly thereafter. (A. 8, 18, 26-27, 31, 34-35). Snapshots of Simmons were shown to the employees several other times by both the F.B.I. and the prosecutor. It is, therefore, clear that all the witnesses identified Simmons as one of the robbers only by viewing these snapshots.

From what little evidence the trial court permitted on the manner in which Simmons was identified as one of the robbers, the F.B.I.'s investigative procedure is significant in two respects.

First, during cross-examination all five of the bank employees who identified Simmons revealed that they began focusing on Simmons when the F.B.I. showed them a group of five or six snapshots, of which several were photos of Thomas Simmons. Phillip Mazaika said he saw five or six snapshots of which two were photos of Simmons. (T. 56, 79). Florence Babick said she saw three pictures of Simmons. (T. 155). Mary Bialek, who viewed pictures several times before the trial, said she saw several pictures of Simmons. (T. 258). Bernice Parliaman remembered that she saw three or four pictures of Simmons among the seven she viewed (T. 294). And, Bernice Dziedzic saw two or three pictures of Simmons among the six pictures she viewed after the robbery. Thus, the memory of each of the identifying witnesses was prodded by the repeated appearance of Simmons' face among the pictures used by the F.B.I. in its search for the robbers.

Second, the memory of the identifying witnesses was further refreshed by visits with the prosecutor immediately before the trial in which the witnesses again viewed pictures. Again Simmons dominated the small group of pictures viewed by the witnesses. Mary Bialek testified that she viewed pictures of Simmons the day before she testified and identified him in Court. (T. 252). Bernice Parliaman said she viewed six pictures, all of them either of Simmons or of Andrews, when she was served with a subpoena to testify. Bernadine Dziedzic also viewed pictures of Simmons a week and a half before the trial when the Assistant United States Attorney visited her at the savings and loan with four pictures (T. 360).

We submit that this procedure was manifestly unfair to defendants. In scrutinizing investigative procedures involving the identification of a suspect by an eyewitness, the courts have been particularly sensitive to overreaching by the police which focuses the witness' attention on a particular suspect.

In *Palmer* v. *Peyton*, ... F.2d ..... (4th Cir., 1966, No. 9609), a rape victim was reversed because the sheriff unduly focused the victim's attention on the accused. Without allowing the accused to confront or to be confronted by his accuser, the sheriff directed the accused to repeat certain phrases the victim alleged were uttered in the course of the attack. After hearing only the lone suspect repeat the phrases, the victim readily identified the suspect as her assailant. The Court particularly noted the fact that the accuser was not given alternative choices and was never required to pick her assailant from a lineup of suspects. The court sitting *en banc* concluded that the suspect, at the most critical point of the proceedings against him, was deprived of the most elementary safeguards of the law.

A conviction was reversed on similar grounds in *People* v. *Hoffner*, 208 Misc. 17, 129 N.Y.S. 2d 833 (1942).

From the abbreviated evidence allowed in the trial, it is clear that the F.B.I. unduly focused the attention of the eyewitnesses on Simmons by inserting several pictures of him into the small group of pictures viewed by the witnesses. We submit that the conviction which resulted from these investigative procedures must be reversed and a new trial granted.

The decision of the Court of Appeals attempts to answer this contention by stating:

> "However, these government witnesses underwent a cross-examination by defense counsel and we believe, the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury. Certainly, we are not convinced in view of the jury's verdict, that the record shows without question that the Association employees were improperly led to identify Simmons as one of the robbers by the showing of these snapshots to the government witnesses who identified Simmons." (Appendix A. p. 7).

Certainly cross-examination is not an adequate remedy for a deprivation of constitutional rights. If this were the case, federal agents could make a practice of ignoring constitutional rights and then challenge a defendant's counsel to attempt to extricate his client after the damage had already been done. In the dissent in *Gilbert* v. *United States,* 366 F.3d 923 (10th Cir., 1966), Judge Browning states at Page 956,

> ". . . it could not be realistically contended that subsequent interrogation of the witnesses to secret lineup would serve as a reasonable substitute . . . The burden rested upon the appellant to establish that the lineup was illegal and that there was a reasonable possibility that attendance of witnesses at the lineup tainted the court room identification. The burden would then

pass to the Government to convince the trial court that the evidence was free of taint."

Under the *Palmer* case, the identification here was shown to be illegal and therefore, cross-examination was not a remedy.

THE TRIAL COURT ERRED IN REFUSING A DEFENSE REQUEST UNDER SECTION 3500 OF TITLE 18, UNITED STATES CODE FOR PICTURES USED IN OBTAINING PRE-TRIAL STATEMENTS FROM GOVERNMENT WITNESSES SUBSEQUENTLY INCORPORATED BY REFERENCE INTO THE WITNESSES' WRITTEN STATEMENTS WHERE IDENTITY WAS THE VITAL ISSUE OF THE TRIAL.

The purpose of Title 18, Section 3500 of the United States Code was to further fair and just administration of criminal justice. *Campbell* v. *United States,* 373 U.S. 487 (1963). A defendant is given the opportunity to completely develop the underlying foundation for a witness' testimony on direct examination through the use of a prior statement. A jury is able to determine how much weight is to be given a particular witness.

Since the identity of the robbers was the entire issue of the trial a full disclosure of the manner in which the defendants were identified was vital. There is no question that photographs were used by F.B.I. agents to obtain statements from the witnesses. It is also certain that the witnesses incorporated the pictures by reference in their statements. Therefore, counsel for the Petitioner Simmons requested the photographs pursuant to Title 18, Section 3500 United States Code. The trial court denied this request.

The statements of the various witnesses varied on the number of pictures they saw of the defendants. There was an even greater variance on the total number of pictures exhibited to the witnesses. In fact, it is not even clear that some witnesses viewed pictures of anyone other than a defendant.

From the prosecutor's own statements and the limited cross-examination of the witnesses identifying Petitioner Simmons, there must have been grave doubt in the minds both of the trial judge and the jurors on the procedures used to identify Simmons. The prosecutor said there was a "multitude" of pictures involved in the procedure. (T. 81). One witness said she saw fifty (T. 255). But all four other witnesses said they saw only about five or six. Obviously the production of the pictures by the prosecution would have greatly aided the defense cross-examination of the witnesses to establish for the court and jury exactly what led to the identification of Simmons and the other defendants.

Although the Assistant United States Attorney indicated he was willing to make available to the defense the groups of pictures used by government agents as they focussed witnesses' attention on defendants (T. 81), the trial court decided *sua sponte* that the defense would not be permitted to use the groups of pictures in cross-examination of the identifying witnesses. (T. 92, 148). As a result, the defense was denied access to evidence in the possession of the government. Nor was it ever determined whether the government had properly retained the groups of pictures to allow full disclosure of the manner in which the defendants were identified. The trial court did not even inspect the pictures *in camera*.

Since the photographs of Simmons were of a limited number, all were relevant to the case on trial, all were re-

ferred to in the witnesses' 3500 statements and all were available to be produced by the prosecutor, the trial court erred in refusing to allow the Government's tender of the photographs.

A DEFENDANT WHO TESTIFIES TO ENFORCE HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT SHOULD NOT BE REQUIRED TO SACRIFICE HIS RIGHTS UNDER THE FIFTH AMENDMENT.

To protect his Fourth Amendment rights against unreasonable search and seizure, Garrett was obliged to take the stand and assert ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the Petitioner Garrett have the proper standing to make the objection, it was essential that he so testify. Over objection, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself.

The identification of the defendant Garrett with the suitcase containing the money wrappers and the other incriminating evidence must have made a vivid impression on the jury. If this evidence was improperly admitted, there exists far more than the "reasonable possibility" that the evidence contributed to the conviction which is necessary for reversal. *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963).

On superficial examination, it would appear that this issue has been decided in *Heller* v. *United States,* 57 F.2d 627 (7th Cir., 1932). There a conviction was affirmed in these words:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon trial of any other issue therein." 57 F.2d 627 at 629.

In a strong and cogent dissent, however, Judge Evans points out that it was necessary for the appellant to make application for the return of the allegedly unlawfully seized property in order to protect himself against the use of such evidence. Judge Evans concludes:

> "The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, as well as his petition, should not be used against him." 57 F. 2d 627 at 630.

A recent decision which is pertinent is *Cristensen* v. *United States,* 259 F. 2d 192 (D.C. Cir., 1958). While the majority affirms convictions in a four-paragraph opinion on the grounds of sufficiency of evidence, Judge Bazelon, dissenting, focuses on the exact issue of the present case in a well-reasoned nine-page opinion. It would be presumptive in the present brief to attempt to improve upon the scholarly analysis of Judge Bazelon of the law of searches and seizures as applied to the very issue here on appeal. Let it suffice to say that Judge Bazelon, with reference to Judge Evan's dissent in *Heller, supra,* points out that no distinction is made between situations where the motion to suppress has been overruled and those where

it has been sustained. To summarize, Judge Bazelon states the problem thusly:

> "We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him.
>
> "To be sure, the Fourth Amendment right to be free from unreasonable search and seizure is a right that may be waived. So also is the Fifth Amendment right not to be compelled to incriminate one's self. But a rule which compels the defendant to forego one of his two constitutional rights as a condition to exercise of the other is, in my opinion, invalid." 259 F. 2d 192 at 197 (Citations omitted, emphasis in original).

The problem cannot be answered by arguing that the Fourth and Fifth Amendments stand apart from each other. This argument was put to rest in *Davis* v. *United States,* 328 U.S. 582 (1946) wherein Justice Frankfurter said:

> "The law of searches and seizures as revealed in the decision of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States,* 116 U.S. 616. It reflects a dual purpose-protection of the privacy of the individual, his right to be let alone, protection of the individual against compulsory production of evidence to be used against him." 329 U.S. 582 at 587.

In the present case, the petitioner Garrett was forced to barter his constitutional protection against an unlawful search and seizure as the price of his good faith effort to exclude the evidence the Government had obtained by a warrantless search. He had no choice; he was forced to take a desperate chance in order to secure the exclusion of the evidence. Failing in his proof, he has been forced

to pay an unconscionable price. The identification of the suitcase and its contents was tantamount to an admission of guilt.

United States Ex Rel. Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir., 1965), in a notably careful and well-reasoned opinion, Judge Thurgood Marshall examines the fairness of placing a criminal defendant on the horns of such a dilemma, and finds it contrary to the guarantees afforded by the Constitution. The opinion roundly condemns the "barter theory of fairness", stating that the Government's argument that the defendant somehow "agreed" to subject himself to re-prosecution if the conviction on the lesser charge were reversed would be "to ignore the elementary psychological realities of the situation." 348 F. 2d 844 at 859. In reply to the Government's arguments based on cases decided near the turn of the century, Judge Marshall outlines the immense strides that have been made in expanding the constitutional protections of the accused in the last few decades. Judge Marshall concludes:

> "(W)e would decline to follow them in applying the fundamental fairness standard, not merely because of their half century antiquity, but because we would not be faithful to the evolution of our social values if we reached any other conclusion." 348 F. 2d. 844 at 863.

The Court of Appeals' decision attempted to dispose of this contention by stating:

> "Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision . . . Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial by jury . . . The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we

would in effect be attempting to create a 'judicial amendment' to the constitution to protect persons from the risks of errors of judgment in trial *tactics.*" (Appendix A, p. 4).

This Court in so holding, is placing a burden and a risk on only one party to the lawsuit. The Government of the United States has the burden of proving its case. Looking at the case from this point of view, the trial court should have required the United States to prove its case independently of a windfall at the time of trial. If the Petitioner Garrett had testified in the defendant's case in chief, obviously this would be a matter of trial tactics and any information obtained from him on cross-examination would be binding against him. However, when the defendant Garrett attempted to avail himself of the constitutional safeguard against unlawful search and seizure, his action was not a matter of trial tactics. *United States* v. *Blalock*, 253 F. Supp. 860 (E.D. Pa. May 13, 1966); *People* v. *DeFilippis*, 34 Ill. 2d 129, 214 N.E. 2d 897 (March 23, 1966).

Therefore, the trial court erred in permitting the testimony of the Petitioner Garrett in support of his motion to suppress the evidence to be read to the jury as part of the Government's case in chief.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

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APPENDIX